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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

NO. 418

LUCIAN J. CILETTI, GEORGE H. KRAUSE, ALLAN SCHULTZ, in their own behalf and in behalf of other citizens of the City of Washington and Borough of East Washington,
Appellants

v.

THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE and RUSSELL M. WYLIE, Intervening Defendants, Appellees

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS APPEAL AND BRIEF FOR THE APPELLEES IN SUPPORT THEREOF AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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THE CITY OF WASHINGTON, BOROUGH OF EAST WASHINGTON, WASHINGTON-EAST WASHINGTON JOINT AUTHORITY, THE CITIZENS WATER COMPANY OF WASHINGTON, PENNSYLVANIA, and MELLON NATIONAL BANK AND TRUST COMPANY, Defendants, and PEOPLES BANK OF UNITY, JAMES M. LAMBIE and RUSSELL M. WYLIE, Intervening Defendants, Appellees

On Appeal from the Supreme Court of Pennsylvania

MOTION TO DISMISS APPEAL AND BRIEF FOR THE APPELLEES IN SUPPORT THEREOF AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Appellees move the Court to dismiss the appeal herein on the following grounds:

I. The appeal is not within the jurisdiction of this Court because not taken in conformity to the statute or to the Court's rules.

II. No substantial federal question is presented by the appeal.

III. The federal question sought to be reviewed by the appeal was not properly raised before or expressly passed on by the Supreme Court of Pennsylvania.

IV. The judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

In addition, if the papers whereon the appeal was taken are treated as a petition for writ of certiorari, the petition should be denied.

ARGUMENT

The provisions of 28 U. S. C. § 1257 pertinent to this appeal and in the alternative to the petition for certiorari are as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> " . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> "(3) By writ of certiorari, where the validity of a . . . State statute is drawn in question on the ground of its being repugnant to the Constitution . . . of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of . . . the United States."

I. The appeal is not within the jurisdiction of this Court because not taken in conformity to the statute or to the Court's rules.

This appeal is not within the jurisdiction of the Court because it has not been taken in conformity with the provisions of the above-quoted statute. For the reasons shown below, there was not drawn in question the validity of a state statute on the ground of its being repugnant to the Constitution of the United States, and

there was no decision in favor of the validity of such a statute under the Federal Constitution.

First, the appellants did not properly draw in question under the United States Constitution the constitutionality of the Pennsylvania Municipality Authorities Act of 1945 or any of the other statutes (Appendix A, pp. 58a-81a) which appellants' Jurisdictional Statement asserts to be involved. Instead, the appellants mainly urged the invalidity of certain contracts entered into by the appellees and others. However, if any of these had been invalid, it would have been by virtue of the state constitution and laws, not the Federal Constitution.

It is true that the Amended Complaint (Appendix C, 40a) alleged that said Acts were repugnant to the Constitution of the United States, but such allegations were not urged before the Pennsylvania Supreme Court. Nowhere in their brief filed with that Court did the appellants specifically argue that federal questions were involved (Appendix B). In fact, not one federal court decision was cited in appellants' brief (See Table of Citations, Appendix B, pp. iii-v). The same Table of Citations shows that not even the Constitution of the United States was cited by the appellants. Rather, appellants contented themselves with statements that the acts and statutes complained of were not "valid" (Appendix B, 12a) or "constitutional" (Appendix B, 104a).

It is, therefore, understandable that the Pennsylvania Supreme Court made no decision in favor of the constitutional validity of the statutes when tested by the United States Constitution. Its opinion (Appendix A, 47a) contains the following sentence:

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> "It is unnecessary to discuss and decide each of appellants' numerous contentions because we are of the opinion that their action is barred by laches." (Appendix A, 49a)

Thus, it clearly appears that neither the validity of the statutes was properly drawn in question nor was there any decision of the highest state court in favor of validity. As a consequence, even if there had been a federal question, it must be deemed to have been waived, and there is nothing to support the appeal jurisdiction in this Court. *Congress of Industrial Organizations v. McAdory,* 325 U. S. 472, 89 L. Ed. 1741 (1945); *Beaty v. Richardson,* 276 U. S. 599, 72 L. Ed. 724 (1928).

Further, the appeal is not within the jurisdiction of this Court because it has not been taken in conformity with the Court's Revised Rules. Rule 15 pertaining to the jurisdictional statement requires that it contain a concise statement of the grounds on which the jurisdiction of this Court is invoked, including cases believed to sustain the jurisdiction (Rule 15 1 (b) (iv)). The appellants' jurisdictional statement contains no such cases. In addition, Rule 15 requires the questions presented by the appeal to be stated without unnecessary detail (Rule 15 1 (c) (i)) and also requires that the statement of the case be concise (Rule 15 1 (d)). In contrast, the appellants take five printed pages to present their questions (pp. 3-7) and five additional pages to state their case (pp. 9-14). Appellants' Statement of the Case is replete with irrelevancies and largely disregards the trial court's Findings of Fact (Appendix C, pp. 352a-377a). The relevant facts are succinctly recited in the opinion of the Pennsylvania Supreme Court, (Appendix A, 48a et seq.)

Nor may the appellants conscientiously assert that in accordance with paragraph 1 (d) of Rule 15 they have provided specific reference to the places in the record where appears the matter which will support their assertion that the rulings of the Pennsylvania Supreme Court "were of a nature to bring the case within the statutory provision believed to confer jurisdiction on this court."

II. No substantial federal question is presented by the appeal.

As already noted, paragraph 59 of the Amended Complaint (Appendix C, 40a) contains the only allegation made by the appellants to the effect that the Pennsylvania statutes cited by appellants conflict with the United States Constitution. It has been shown, however, that such claims were not urged upon the Pennsylvania Supreme Court. Other allegations regarding constitutionality were mere references to an "unlawful and unconstitutional delegation of authority" (Appendix C, 37a), to ordinances and contracts that were supposedly "unlawful, unconstitutional and void" (Appendix C, 38a), to ordinances imposing a tax "in violation of the Constitutions of Pennsylvania and the United States" (Appendix C, 341a), to "a violation of due process" (Appendix A, 40a) and to "constitutional issues" (Appendix A, 44a).

Under many decisions of this Court it has been held that the Court will not take cognizance of claims based on such passing references. To present properly a federal question, care must be taken to refer clearly to the particular clause or clauses of the federal Constitution, as well as the rights claimed thereunder, in order to

bring the matter to the attention of the state court. *Herndon v. Georgia,* 295 U. S. 441, 79 L. Ed. 1530 (1935); *New York ex rel. Bryant v. Zimmerman,* 278 U. S. 63, 73 L. Ed. 184 (1928); and *F. G. Oxley Stave Company v. County of Butler,* 166 U. S. 648, 41 L. Ed. 1149 (1897).

Nor did the appellants present their "constitutional" objections to the Supreme Court of Pennsylvania in a manner which left no doubt that reliance was placed on federal, rather than state, rights. For example, the Pennsylvania Constitution, as well as the United States Constitution, contains a due process clause. Pa. Const. Art. I §9. If it is not made clear that the federal, rather than the state, constitution is involved, it will be assumed that reference is being made to the state constitution. *Bowe v. Scott,* 233 U. S. 658, 58 L. Ed. 1141 (1914); *New York ex rel. Bryant v. Zimmerman,* supra (278 U. S. 63).

By their lack of particularity in constitutional references and their failure to urge federal constitutional questions in the appellate state court, appellants waived any federal question. Consequently, no substantial federal question is presented by the appeal.

III. The federal question sought to be reviewed by the appeal was not properly raised or expressly passed on by the Supreme Court of Pennsylvania.

The failure to raise a federal question before the Pennsylvania Supreme Court has been dealt with in Sections I and II above. A reading of the opinion of that Court on the matter (Appendix A, 47a) discloses that the Court did not pass on any federal question. Rather, after reciting the facts of the case, the Court stated that,

"It is unnecessary to discuss and decide each of appellants' numerous contentions because we are of the opinion that their action is barred by laches" (Appendix A, 49a). The Court then concluded its brief opinion by discussing the laches present in the case.

It is true, of course, that Federal rights may be denied by a refusal of a state court to consider and decide questions, no less than by an erroneous decision. But, in order to have a state decision by inaction, the federal question must have been fairly presented to the state court and its decision must have been necessary to the determination of the cause. *Bell's Gap R.R. Co. v. Commonwealth of Pennsylvania,* 134 U. S. 232, 33 L. Ed. 892 (1890); and *Chapman v. Crane,* 123 U. S. 540, 31 L. Ed. 235 (1887). As already shown, no federal question was before the Pennsylvania Supreme Court. Further, in the case at bar there was no need for the Pennsylvania Supreme Court to pass upon a federal question (not even argued before it), because that court's decision could and did rest solely upon an adequate non-federal basis, i. e. the appellants' laches.

IV. The judgment of the Supreme Court of Pennsylvania rests on an adequate non-federal basis.

This Court has consistently followed the principle that it will not review a judgment of a state court based upon an adequate non-federal ground, even if a federal question may have been involved and may even have been wrongly decided by the state court. *Herb v. Pitcairn,* 324 U. S. 117, 89 L. Ed. 789 (1945); *Fox Film Corporation v. Muller,* 296 U. S. 207, 80 L. Ed. 158 (1935). The

reason for such practice was well expressed by Mr. Justice Jackson as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds . . . The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our jurisdiction. Our only power over state judgments is to correct them to the extent that they inaccurately adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we correct its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn,* supra (324 U. S. 117, 125-126, 89 L. Ed. 789, 794).

In the case at bar, the Pennsylvania Supreme Court based its judgment on one ground only, i. e. laches. In doing so, it followed its prior ruling in *Neizer v. Schuylkill Township School District,* 384 Pa. 323, 121 A. 2d 93 (1956), a case involving the same Pennsylvania statute and facts almost identical with those in this litigation.

This Court has held many times that where a state court bases its judgment on laches and the decision is made in good faith, its judgment is adequate and so defeats review by this Court. *Utley v. St. Petersburg,* 292 U. S. 106, 78 L. Ed. 1155 (1934); *Wood v. Chesborough,* 228 U. S. 672, 57 L. Ed. 1018 (1913); *Preston v. Chicago,* 226 U. S. 447, 57 L. Ed. 293 (1913).

To say that this Court has many times held laches to be an adequate non-federal basis for dismissing an appeal or denying a petition for certiorari is not, of course, to say that the Court has no right to examine the state court's decision so as to assure itself that the finding of laches is reasonable and not merely a subterfuge for a means to deny a federal right. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673, 74 L. Ed. 1107 (1930); *Ancient Egyptian Arabic Order of Nobles of the Mystic Shrine v. Michaux,* 279 U. S. 737, 73 L. Ed. 931 (1929). Nevertheless, it is clear from a reading of the opinion of the Pennsylvania Supreme Court (Appendix A, 48-50a) that the facts of the case recited therein establish laches beyond any doubt.

V. If the papers whereon the appeal was taken are treated as a petition for writ of certiorari, the petition should be denied.

28 U. S. C. § 2103 directs that if an appeal is improvidently taken in a case where the proper mode of review is by petition for certiorari, the papers whereon the appeal is taken shall be regarded and acted on as a petition for a writ of certiorari. If in the present case the Court takes this course, it is clear that the petition must be denied. First, it should be denied for jurisdictional reasons appearing from the discussion in Sections I through IV above. Secondly, it should be denied for the reason that the appellants have failed to aver or prove (a) the involvement of the validity of a state statute, as against a claim of its repugnance to the federal Constitution; or (b) the involvement of any question of sufficient importance to warrant consideration by this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the appeal should be dismissed and that if the papers whereon the appeal was taken are treated as a petition for a writ of certiorari, the petition should be denied.

Respectfully submitted,

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